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November 11, 2011

Maureen G. Kelly  
Lake County Clerk of Courts  
25 North Park Place  
Painesville, Ohio 44077

Re: State ex rel. Robert Merrill, Trustee, et al. v. State of Ohio, Department of Natural Resources, et al.  
Lake County Court of Common Pleas Case No. 04CV001080

Dear Ms. Kelly:

Enclosed please find, for filing, the original and two (2) copies of Joint Statement of Remaining Claims or Issues of State Defendants. Please file the original and return a time-stamped copy to me in the enclosed postage-paid envelope.

Thank you for your assistance. If you have any questions, please do not hesitate to call me.

Sincerely,

MIKE DEWINE  
ATTORNEY GENERAL

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cc: Counsel of record (U.S. mail and/or email)

**IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO**

|                                  |   |                       |
|----------------------------------|---|-----------------------|
| STATE OF OHIO EX REL.,           | ) |                       |
| ROBERT MERRILL, TRUSTEE, et al., | ) | Case No. 04-CV-001080 |
|                                  | ) |                       |
| Plaintiffs-Relators and Named    | ) | JUDGE EUGENE A. LUCCI |
| Class Representatives,           | ) |                       |
|                                  | ) |                       |
| and                              | ) |                       |
|                                  | ) |                       |
| HOMER S. TAFT, et al.,           | ) |                       |
|                                  | ) |                       |
| Intervening Plaintiffs-Relators, | ) |                       |
| Pro Se,                          | ) |                       |
|                                  | ) |                       |
| v.                               | ) |                       |
|                                  | ) |                       |
| STATE OF OHIO, DEPARTMENT        | ) |                       |
| OF NATURAL RESOURCES, et al.,    | ) |                       |
|                                  | ) |                       |
| Defendants-Respondents and       | ) |                       |
| Counterclaimants,                | ) |                       |
|                                  | ) |                       |
| and                              | ) |                       |
|                                  | ) |                       |
| NATIONAL WILDLIFE FEDERATION,    | ) |                       |
| et al.,                          | ) |                       |
|                                  | ) |                       |
| Intervening Defendants and       | ) |                       |
| Counterclaimants.                | ) |                       |

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**JOINT STATEMENT OF REMAINING CLAIMS OR ISSUES  
OF STATE DEFENDANTS**

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Defendants Ohio Department of Natural Resources, its Director and the State of Ohio (hereinafter collectively “the State Defendants”), by and through their respective counsel, hereby submit this Joint Statement of Remaining Claims or Issues setting forth the State Defendants’ contention of each and every claim and/or issue which remains pending and required to be determined or resolved by this Court, in accordance with the Court’s Order of October 14, 2011. Accordingly, this joint statement includes whether the claim or issue is factual or legal in nature,

or both, whether there is a known dispute by other parties of that claim or issue, and whether discovery and/or an evidentiary hearing is required for determination or resolution of that claim or issue.

I. BACKGROUND

Pursuant to the Court's Order Certifying Class Action on Count One of the First Amended Complaint in this action on June 9, 2006, the Court found that the following three questions of law common to the class:

- (1) What constitutes the furthest landward boundary of the "territory" as that term appears in R.C. 1506.10 and 1506.11, including, but not limited to, interpretation of the terms "southerly shore" in R.C. 1506.10, "waters of Lake Erie" in R.C. 1506.10, "lands presently underlying the waters of Lake Erie" in R.C. 1506.11, "lands formerly underlying the waters of Lake Erie and now artificially filled" in R.C. 1506.11, and "natural shoreline" in RC. 1506.10 and 1506.11.
- (2) If the furthest landward boundary of the "territory" is declared to be the natural location of the ordinary high water mark as a matter of law, may that line be located at the present time using the elevation of 573.4 feet IGLD (1985), and does the State of Ohio hold title to all such "territory" as proprietor in trust for the people of the State.
- (3) What are the respective rights and responsibilities of the class members, the State of Ohio, and the people of the State in the "territory."

Class Certification Order, ¶4.

The Court further determined that "a class action shall be maintained on Count I of Plaintiffs-Relators' First Amended Complaint upon the common questions of law found herein, and hereby certifies that class action under the provisions of Civ.R. 23(B)(2). The two remaining counts of Plaintiffs-Relators' First Amended Complaint – 'Count II - Mandamus Inverse Takings Compensation' and 'Count III - (In the Alternative) Mandamus/Inverse Takings Compensation' - are hereby bifurcated pending final resolution of Count I." Class Certification Order, ¶8.

The State Defendants believe that all three certified questions have been answered, and that no further claims or issues remain under Count I of Plaintiffs' First Amended Complaint. The first and third questions certified under Count I of Plaintiffs' First Amended Complaint were answered by the Ohio Supreme Court and/or by portions of the lower courts' opinions undisturbed on appeal. And though the Supreme Court held that the State of Ohio holds title to the "territory" as proprietor in trust for the people of the State, the main issue presented in the second certified question (i.e. regarding ODNR's methodology for locating the "ordinary high water mark") was rendered moot by the Supreme Court's decision on the first question.

Consequently, the Class Action is concluded, and all other remaining claims or issues below do not proceed as a class action. The court need not de-certify the class to proceed upon the remaining claims or issues below, because the initial certification, on its own terms, was limited to the three certified questions under Count I of Plaintiffs' First Amended Complaint. Thus, the class terminates automatically and no class exists as to the remaining counts of Plaintiffs' First Amended Complaint or the Defendants' Counterclaims.

## II. REMAINING CLAIMS OR ISSUES

### A. Remaining claims or issues under the State Defendants' Counterclaim against the named Plaintiffs-Relators and Intervening Plaintiffs-Relators.

The majority of the claims and issues raised by the State Defendants' Counterclaim filed in this action and in the consolidated case of State ex. rel. Taft, et al. v. State of Ohio, Department of Natural Resources, et al., Case No. 04-CV-001081 (hereinafter "Taft") were also addressed under Supreme Court's and lower courts' declarations under the three certified questions of law in the Class Action. However, the State Defendants' Counterclaim did seek a declaration that each of the named Plaintiffs were required to obtain authorization from the State pursuant to Ohio law – R.C. 1506.11 and the administrative regulations promulgated thereunder – for any improvements or developments of Plaintiffs beyond the natural location of "the ordinary high water mark" of Lake Erie. Counterclaim, ¶ 44 and Prayer for Relief, ¶ (f).

The Ohio Supreme Court has now declared in this action that the Lake Erie "territory" described in R.C. 1506.10 and 1506.11 held by the State of Ohio as proprietor in trust for the people of the State "extends to the natural shoreline, which is the line at which the water usually stands when free from disturbing causes." *State ex rel. Merrill v. Ohio Dept. of Natural*

*Resources*, 2011-Ohio-4612, syllabus ¶ 3, citing *Sloan v. Biemiller* (1878), 34 Ohio St. 492, and *State v. Cleveland & Pittsburgh RR. Co.* (1916), 94 Ohio St. 61, 113 N.E. 677, approved and followed; R.C. 1506.10 and 1506.11 construed. Likewise the Supreme Court has also reaffirmed in this action that “[t]he littoral owners of the upland have no title beyond the natural shoreline; they have only the right of access and wharfing out to navigable waters.” *Id.* at ¶ 62 citing and quoting *State ex. rel Squire v. Cleveland* (1948), 150 Ohio St. 303, 337.

Therefore, the State Defendants’ Counterclaim may now seek a judgment declaring that each of the named Plaintiffs in this action and in Taft, who are now Intervening Plaintiffs in this case, are required to obtain authorization from the State pursuant to Ohio law – R.C. 1506.11 and the administrative regulations promulgated thereunder – for any improvements or developments of Plaintiffs that extend beyond “the natural shoreline” of Lake Erie.

However, ODNR and its Director may no longer wish to pursue these claims against Plaintiffs in this action or in Taft, as they are continuing to explore the possibility of new or modified legislation and/or administrative rules, and might voluntarily dismiss this remaining claim under the State Defendants’ Counterclaim.

If the State Defendants do pursue these claims, the issues presented will be both factual and legal in nature, they may be disputed by the Plaintiffs in this action and in Taft, and discovery and evidentiary hearing will be required for determination and resolution of those claims and issues.

B. Any claims by the named Plaintiffs-Relators and defenses by the State Defendants under the two remaining counts of Plaintiffs-Relators’ First Amended Complaint.

Pursuant to the Court’s June 9, 2006 Class Action Order, the remaining counts of Plaintiffs-Relators First Amended Complaint – “Count II - Mandamus Inverse Takings Compensation” and “Count III - (In the Alternative) Mandamus/Inverse Takings Compensation” – were bifurcated pending final resolution of Count I. Class Certification Order, ¶8.

If the named Plaintiffs-Relators intend to pursue their claims under these counts, the issues presented will be both factual and legal in nature, they will be disputed by the State Defendants, and discovery and evidentiary hearing will be required for determination and resolution of those claims and issues.

C. Any claims by Plaintiff OLG and defenses by State Defendants to Plaintiff OLG's Renewed and Supplemented Motion for Fees.

On October 14, 2011, Plaintiff OLG filed a Renewed and Supplemented Motion for Fees, against the State Defendants. On October 28, 2011, the Court filed an Order approving the Stipulation of the parties to stay all proceedings relating to that Motion pending the December 2, 2011 case management conference.

If the named Plaintiffs-Relators intend to pursue their claims under that Motion, the issues presented will be both factual and legal in nature, they will be disputed by the State Defendants, and discovery and evidentiary hearing will be required for determination and resolution of those claims and issues.

D. As a housekeeping issue, should the consolidated Taft case continue as a separate action given the Taft Plaintiffs' status and Intervening Plaintiffs in this case.

The issue presented will be legal in nature and in the Court's discretion, there is no known dispute between the parties, and no discovery or evidentiary hearing will be required for determination and resolution of this issue.

Respectfully submitted,

**MIKE DEWINE**  
**ATTORNEY GENERAL**

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*Scott Zody, Interim Director*

Respectfully submitted,

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*Counsel for Defendant State of Ohio*

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Joint Statement of Remaining Claims or Issues of State Defendants was sent by regular U.S. mail, this 14<sup>th</sup> day of November 2011 to:

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